BRADLEY ARANT BOULT CUMMINGS LLP

Wendell Cauley
Direct: (334) 956-7603
Fax: (334) 956-7803
wcauley@babc.com

April 16, 2010

Via Electronic Filing

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: CC Docket No. 96-45 Federal-State Joint Board on Universal Service

TracFone Wireless, Inc. - Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama

NOTICE OF EX PARTE PRESENTATION

Dear Ms. Dortch:

We are writing to call to the Commission's attention a recent development relevant to issues addressed in the Notice of Ex Parte Presentation of TracFone Wireless, Inc. ("TracFone") dated April 7, 2010, in the referenced matter (the "Notice"), and to respond to certain matters presented in the Notice briefly. The development we refer to is the April 2, 2010, Order of the Circuit Court of Madison County, Alabama denying Plaintiff, T-Mobile South LLC's ("T-Mobile") Motion for Summary Judgment, and granting the Defendant in the case, Alabama Commercial Mobile Radio Service Emergency Telephone Service Board's (the "Board"), Cross-Motion for Summary Judgment (the "Order"), in the case styled *T-Mobile South LLC, et al. v. Leslie Bonet, et al.*, in the Circuit Court of Madison County, Alabama, Case No. CV-08-900128-CPP (a copy of which Order is attached).

T-Mobile had argued to the Circuit Court of Madison County that the Alabama Emergency Telephone Service Act, codified at §§ 11-98-6 through 11-98-11, *Code of Alabama 1975*, as amended (the "Act"), does not authorize imposition of Alabama's CMRS service charge on prepaid wireless customers. The Circuit Court of Madison County, Alabama, however, held that the CMRS service charge applies to *all* wireless customers, whether services are prepaid or billed, and also that T-Mobile's use of an "average revenue per user" ("ARPU") method of estimating the amount of the CMRS service charge (*i.e.*, during an interval in which T-Mobile had paid some of CMRS service charge) was not authorized under Alabama law.

In its Comments in this proceeding, TracFone has contended that it is only obliged to collect and remit to the Board the Alabama CMRS service charges on prepaid wireless services which TracFone sells directly; and in the Notice, TracFone stated that it has been demonstrated repeatedly in Alabama that "911 funding mechanisms based on collection of billed surcharges from users of wireless telecommunications services are not workable for prepaid services." The Madison County Circuit Court's Order confirms that there is no exception to the obligation to pay the CMRS service charge for prepaid wireless services, and also that use of the ARPU method in Alabama violates the applicable statutes. The Madison County Circuit Court's Order, therefore, supports the Board's arguments for rejection of TracFone's self-certification that it is in compliance with all provisions of Alabama law applicable to 911 and E-911 obligations.

TracFone, however, contends that no court, no administrative agency, nor any tribunal of competent jurisdiction in the State of Alabama has made a determination with respect to TracFone's compliance with state law. The Board is the state administrative agency authorized to administer the State of Alabama's wireless 911 fund. The Board has determined that TracFone's remittance policy based on the ARPU methodology does not comply with the state 911 law. The Board also has the authority to audit service providers, such as TracFone, to determine if they are in compliance with the state 911 laws. Exercising this statutory authority, the Board authorized an audit of TracFone's business records. The independent auditor retained by the Board determined that TracFone under-remitted by a very substantial amount for the period of December 2006 through December 2008. As explained above, the Madison County Circuit Court also has since held that the state 911 laws apply to telephone numbers associated with prepaid wireless telephone service, and that use of the ARPU methodology does not comply with applicable Alabama law. TracFone's contention, therefore, is without merit.

In its April 7 Notice, TracFone pointed out that other states have enacted laws requiring the point of retail sale remittance methodology to fund their wireless 911 systems. While other states may have enacted such laws, Alabama has not. As explained in prior comments, Alabama's state 911 laws require that service providers collect and remit the service charge for *every* mobile telephone number they service with a principal place of use in Alabama.

Contrary to TracFone's claims, the Board also is not attempting to deprive low-income Alabama households access to the SafeLink Wireless Lifeline program. Rather, the Board is fulfilling its statutory obligation to manage the state 911 wireless fund by requiring service providers in Alabama to comply with the state 911 laws. The FCC has mandated that TracFone comply with state 911 laws. Thus, it is TracFone's actions, not the Board's, which jeopardize TracFone's designation as an ETC in Alabama.

Lastly, TracFone's final argument in its April 7 Notice that the Board is without authority to petition to revoke TracFone's ETC designation is absurd. TracFone was to self-certify to the Commission that it is compliant with Alabama laws governing 911. The Board is the state agency responsible for ensuring that wireless service providers are compliant with the state

wireless 911 laws. Indeed, the Board is the only agency of the State of Alabama that is in the position to comment to the Commission as to whether TracFone's self-certification is accurate. TracFone effectively argues that the State of Alabama lacks standing or authority to appear before the Commission to petition for relief. This argument has no basis in law or fact.

Should you have any questions relating to this submission, please do not hesitate to contact the undersigned counsel for the Board.

Respectfully,

Wendell Cauley

Enclosure

cc: Louis Peraertz, Esq. (w/enclosure)
Charles Bradford Mathias, Esq. (w/enclosure)
Ms. Jennifer McKee (w/enclosure)
Ms. Romanda Williams (w/enclosure)
Mitchell F. Brecher, Esq. (w/enclosure)
Leighton W. Lang, Esq. (w/enclosure)

CERTIFICATE OF SERVICE

I, Wendell Cauley, attorney for the Alabama Commercial Mobile Radio Services Board, hereby certify that on April 16, 2010, I caused to be served a true and correct copy of the foregoing by U.S. Mail, first-class, postage prepaid and addressed to the following individuals:

Mitchell F. Brecher, Esq.
Greenberg Traurig, LLP
2101 L Street, NW
Suite 1000
Washington, DC 20037

Leighton W. Lang, Esq.
Assistant Vice President & General Counsel
State Regulatory Affairs
TracFone Wireless, Inc.
9700 N.W. 112th Avenue
Miami, Florida 331778

Wendell Cauley, Counsel for the
Alabama Commercial Mobile Radio
Services Board

IN THE CIRCUIT COURT OF MADISON COUNTY

T-MOBILE SOUTH LLC, etc., et al., **Plaintiffs,** **vs.** **LESLIE BONET, et al.,** **Defendants.**	**CIVIL ACTION NUMBER** **CV 08-900128-CPP**

ORDER

This matter came on for hearing on cross motions for summary judgment. There are no genuine issues of material fact in this case, other than the calculation of damages, and the matter is appropriate for summary judgment as a matter of law.

This action challenges the application of a commercial mobile radio service ("CMRS") emergency telephone service charge to Plaintiffs' prepaid wireless telephone service. The Defendants are members of the Alabama Commercial Mobile Radio Service Emergency Telephone Service Board ("the Board"). The service charge at issue funds enhanced emergency 911 telephone services.

Plaintiffs, CMRS providers, contend that the Alabama Emergency Telephone Service Act ("the Act"), Alabama Code §§ 11-98-6 through 11-98-11, originally passed by the Alabama Legislature in 1998 and amended in 2007, does not authorize the imposition of the CMRS service charge ("the Charge") on their prepaid wireless customers. The basis for this contention is that the Act, both pre-amendment and as amended, requires that the Charge be levied on:

each CMRS connection that has a principal wireless service address (or billing address, if the principal wireless service address is not known) within the state.

§11-98-7(b)(1),1998 version;

or

each CMRS connection that has a place of primary use within the geographical boundaries of the State of Alabama.

§11-98-7(b)(1),as amended, 2007.

Also underlying the Plaintiffs' position is the language of §11-98-8(a), which reads:

Each CMRS provider shall act as a collection agent for the CMRS Fund and shall, as a part of the provider's normal monthly billing process, collect the CMRS service charges levied upon CMRS connections pursuant to Section 11-97(b)(1) from each CMRS connection to whom the CMRS provider provides CMRS service and shall, not later than 60 days after the end of the calendar month in which such CMRS service charges are collected, remit to the board the net CMRS service charges collected after deducting the fee authorized by subsection (b). Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

1998 version;

or

each CMRS provider shall act as a collection agent for the CMRS Fund and shall collect the CMRS service charges levied upon CMRS connections pursuant to Section 11-98-7(b)(1)from each CMRS connection to whom the CMRS provider provides CMRS service and shall, not later than 60 days after the end of the calendar month in which such CMRS service charges are collected, remit to the board the net CMRS service charges collected after deducting the fee authorized by subsection (b). Each billing provider shall list the CMRS service charge as a separate entry on each bill which includes a CMRS service charge.

As amended 2007.

Plaintiffs contend that because they do not bill their prepaid wireless customers, the 1998 version of the Act does not apply to them. The Plaintiffs further contend that because they are without knowledge of their prepaid wireless customers' "place of primary use," the amended Act also fails to apply to them.

From May 2003 until May 2005, Plaintiffs remitted the Charge for their prepaid wireless customers even though they did not collect the Charge from those customers. From June 2005 through June 2007, the Plaintiffs neither paid nor collected the Charge. Effective July 2007, Plaintiffs have remitted the Charge for their prepaid wireless customers without billing or collecting for it.[1]

Plaintiffs seek a declaratory judgment that the Charge is not applicable to them, or if it is applicable, that it violates the Commerce Clause of the United States Constitution. Plaintiffs seek to enjoin the collection of the Charge, to impose a constructive trust on the CMRS Fund, and they also seek a refund of the amounts they have paid on behalf of their prepaid wireless customers.

Defendants counterclaim for declaratory judgment and seek damages and interest for the unpaid charges. They also claim damages for underpaid charges. The counterclaim asks the Court to declare that the Act applies to the mobile telephone numbers assigned to Plaintiffs' prepaid wireless customers and to enter a permanent injunction enjoining Plaintiffs from failing to collect and/or remit the Charge. Defendants rely on the language in the Act and principles of statutory construction, viewing the Act in its entirety and its intent, to support their position.

The appellate courts of Alabama have given a number of principles for a trial court to follow in construing statutes. The Court's "inquiry begins with the language of the statute, and if the meaning of the statutory language is plain, [the] analysis ends there." *Ex parte McCormick*, 932 So. 2d 124, 132 (Ala. 2005). Both sides argue that the plain meaning of the statute supports

---

[1]Defendants dispute the accuracy of Plaintiffs' calculation of the amount remitted for this time period.

their position.[2] Another important statutory construction principle is that a court should examine the statute as a whole. For example, in *Bean Dredging, L.L.C. v. Alabama Dept. of Revenue*, 855 So. 2d 513, 517 (Ala. 2003) the Alabama Supreme Court states:

> When interpreting a statute, this Court must read the statute as a whole because statutory language depends on context; we will presume that the Legislature knew the meaning of the words it used when it enacted the statute. *Ex parte Jackson*, 614 So.2d 405, 406-407 (Ala.1993). Additionally, when a term is not defined in a statute, the commonly accepted definition of the term should be applied. *Republic Steel Corp. V. Horn*, 268 Ala. 279, 281, 105 So. 2d 446, 447 (1958).

And in *Standard Oil Co. v. State*, 313 So. 2d 532, 539 (Ala.Civ.App. 1975), the Alabama Court of Civil Appeals directs that:

> the court must consider the entire statute and not an isolated part, giving to every clause effect in light of the subject matter and purpose of the enactment.

In addition, the court must consider the intent and purpose of the legislation in order to give effect to the challenged legislation. The Supreme Court has stated, in *State v. Advertiser Co.*, 257 Ala. 423, 59 So. 2d 576, 579 (1952):

> we first consider the intent and purpose of the Legislature in the enactment...and then, if necessary resort to the definition as found in the dictionaries, which usually give us the common understand [sic] and to which courts usually resort.

---

[2] Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.
IMED Corp. v. Systems Engineering Assocs. Corp., 602 So.2d 344, 346 (Ala. 1992).

The Court of Civil Appeals notes in *Alabama Bd. of Pardons & Paroles v. Brooks*, 802 So. 2d 242, 247 (Ala.Civ.App. 2001):

> It is a well-settled rule of statutory construction that courts ascertain the Legislature's intent is enacting a statute from the language used in the statute itself, as well as from the reason for the statute and the goals the Legislature seeks to accomplish through the statute.

In reaching its conclusions, the Court has applied the above-stated principles.

Based upon the plain language of the Act, the Court finds that the Act applies to prepaid wireless customers. To hold otherwise would lead to the "absurd" result that one group of beneficiaries of the Act are not required to fund it while another group of beneficiaries is so burdened. *See, Ex parte Meeks*, 682 So.2d 423, 428(Ala.1996). The specific purpose of the Act is to fund the enhanced emergency 911 system for all wireless telephone customers, whether or not their service is prepaid. There is no dispute that the Plaintiffs are CMRS providers under the Act, which defines a "CMRS Connection" as either: (a) "Each number assigned to a CMRS customer" (1998 version), or (b) "A mobile telephone number assigned to a CMRS customer" (2007 amendment). §11-98-6. The Act makes no distinction in the definition of a customer, whether prepaid or billed.

In the 1998 legislation, the term "prepaid" is not used. In the 2007 amendments, the term appears in §11-98-7.2, which created a long range study commission to look at, *inter alia*,

> (6) The process by which all providers of telephone services, including wired and wireless providers and prepaid and post-paid providers, collect and remit 911 charges in this state and in other states.
>
> ****

> (8) The specific barriers to the collection and remittance of the CMRS service charge by providers of prepaid wireless telephone services and solutions that have been developed and utilized in other states.

This language in the 2007 amendments does not change the purpose, intent or application of the Charge. It merely delineated areas about which the Legislature sought information from a short-lived commission.

The Board has always interpreted the Act, both before and after the 2007 amendment, to apply to prepaid wireless customers. Such interpretation is entitled to great weight. *See e.g. Ex parte State Health Planning & Dev. Agency*, 855 So. 2d 1101-03 (Ala. 2002). Prior to the 2007 amendment, the Attorney General issued an opinion concerning the intent of the Legislature in enacting the original legislation:

> The intent of the Legislature was to levy the same emergency service charge on prepaid phone customers as on billable customers.

2002 Op. Att'y Gen. 295 at 3.[3] The Legislature is presumed to have been aware of these interpretations when it passed the 2007 amendment, and nothing in that amendment contradicts the Board's and the Attorney General's interpretation.[4] Furthermore, the Act operates for the benefit of all wireless customers with access to 911, to provide funds for enhanced E-911 services to those customers, regardless of whether they prepay or are billed. Therefore, the

---

[3] "While an opinion of the Attorney General is not binding, it can constitute persuasive authority." *Alabama-Tennessee Natural Gas Co. v. Southern Natural Gas. Co.*, 694 So. 2d 1344-1346 (Ala. 1997).

[4] In *Blue Cross & Blue Shield v. Nielson*, 714 So. 2d 293, 297 (Ala. 1998), the Supreme Court states: "It is a familiar principle of statutory construction that the Legislature, in enacting new legislation, is presumed to know existing law."

Court finds that the Charge applies to Plaintiffs' prepaid customers, and thus, Plaintiffs, as CMRS providers, are required to collect the Charge for each of its prepaid wireless customers in Alabama.[5]

Plaintiffs' claim that the imposition of the Charge as to their prepaid wireless customers violates the Commerce Clause of the United States Constitution also fails. The Charge is based upon activity that has a substantial nexus to the State of Alabama in that the customers to whom this charge applies have a primary use in the state. Plaintiffs have the capacity to ascertain the place of primary use of their prepaid wireless customers, and their intentional failure to obtain this information cannot relieve them of their obligation to determine those addresses. One does not excuse the failure to exercise a fiduciary obligation by wilfully failing to act. Only if the Plaintiffs obtain information from the customer which places their primary use outside Alabama would their obligation under the Act be relieved.

The Act meets the other requirements of Constitutionality. The Charge is fairly apportioned because it applies across the board to the beneficiaries of the services which the Charge funds. By limiting its application to customers with a primary use address in Alabama, the Act does not discriminate against interstate commerce and fairly relates to the benefits provided the customer.[6]

---

[5]It is undisputed that Plaintiffs can ascertain the residential street address or primary business address of customers in a number of ways, the simplest being to ask for it just as they ask for such information when prepaid services are charged to a credit card. They have simply chosen not to do so. Willful blindness is no excuse in failing to comply with legal responsibilities. In addition, Plaintiffs have the capability of deducting the Charge monthly from prepaid customers as they do with charges for 411 calls.

[6]*See, Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) for the requirements under the Commerce Clause.

Because the Court has determined that the Charge has applied to Plaintiffs' prepaid customers since 1998, Plaintiffs are not entitled to any of the relief sought in their Complaint, and their Motion for Summary Judgment is due to be denied.

Defendants are entitled to a permanent injunction. They have succeeded on the merits of their declaratory judgment action. The threat of irreparable, repetitive harm is clear. Since the Plaintiffs are required to collect and remit the Charge monthly, should they fail to do so, the Defendants would be forced to bring suit in the Circuit Court of Montgomery County periodically to enforce collection. *See, City of Prichard v. Cooper*, 358 So.2d 440, 441(Ala. 1978). Plaintiff has shown no harm caused by their having to collect and/or remit the Charge. Finally, an injunction is in the public interest in this case in order to assure that 911 and enhanced 911 services are adequately funded.

The Court finds that Plaintiffs have wilfully breached their statutory duty to collect the Charge from 2005 to 2007. However, Defendants cannot claim damages for this entire period as it goes beyond the two year statute of limitations for tort claims, and the Charge does not qualify as a tax under the provisions which would allow a five year statute of limitations to apply.[7] Defendants claims for underpayment during the 2003-2005 period are also outside the statute of limitations.

The Court further finds that Plaintiffs have a fiduciary responsibility to collect and/or remit the Charge to Defendants. The statute specifically makes Plaintiffs "agents" of the CMRS Board for the collection and remission of the Charge. § 11-98-8(a). Thus, the statute creates the

---

[7]. The discussion by United States District Judge Lynwood Smith in *Madison County Communications District v. Bellsouth Telecommunications, Inc.*, Civil Action 06-S-1786-NE (NDAL, decided April 15, 2009), at pp. 25-27, persuasive on this point.

agency relationship. Such a relationship is fiduciary in nature. Because the amounts claimed as damages include periods beyond the two-year statute of limitations, the Court will require the Defendants to submit new calculations which do not represent claims arising before February 8, 2006, two years before this action was filed.[8]

Defendants also claim underpayment of the Charge since the Plaintiffs resumed paying in 2007. Plaintiffs have used a method of estimating the amount owed based upon an "average revenue per user" (ARPU) methodology. This ARPU method, while approved in at least one other state, is not approved in Alabama. In addition, Defendants argue persuasively that the method seriously understates the amount of the Charge due to be remitted. Upon review, the Court finds that use of the ARPU method to calculate the amount of the Charge to be remitted violates the Act. Therefore, Defendants are entitled to a recovery of this underpayment as damages. [9]

Defendants also claim that Plaintiffs are not entitled to deduct one percent from the amount properly included in the Charge because they have not collected from customers. The Act reads:

> Each CMRS provider shall be entitled to deduct and retain from the service charges collected by the provider during each calendar month and amount not to exceed one percent of the gross aggregate amount of the CMRS service charges collected as reimbursement for the costs incurred by the provider in collecting, handling and processing the CMRS service charges.
>
> §11-98-8(b).

In order to qualify for the deduction, there must first be an amount collected from which the

---

[8] Plaintiffs will have the opportunity to rebut these calculations.

[9] See footnote 8, *supra*.

deduction can be taken. If the Charge is remitted without collecting it from customers, there is no amount from which the deduction can be taken. Because Plaintiffs have chosen to remit the Charge without first collecting it, they are not entitled to the one percent deduction.

The Court reserves final judgment pending further consideration of the calculation of damages. The parties shall have 30 days from the date of this order to present written calculations, with appropriate support, based upon the findings herein. Responses to these submissions shall be due 30 days thereafter. If necessary, the Court will schedule an evidentiary hearing on this issue.

DONE and ORDERED this 2nd day of April, 2010.

CARYL P. PRIVETT
CIRCUIT JUDGE